

"An action was brought for breach of a written contract which contained an agreement to refer matters in dispute between the parties. The defendant attended at chambers on the hearing of a summons for directions taken out by the plaintiffs, on which an order was made that the plaintiffs and defendant should respectively make discovery of documents. The defendant subsequently applied under s.4 of the Arbitration Act, 1889, for a stay of proceedings.

Held, that the defendant had taken a step in the proceedings, and was, therefore, not entitled to a stay.

In his judgment, Collins M.R. stated at pages 481 and 482:

"That which Order xxx has done is to enable the parties to obtain on one summons an order, with respect to all interlocutory proceedings to be taken in the action, which they might, before this rule took effect, have obtained on several distinct summonses. The parties appear before the master with, as it were, a blank sheet on which he may make this inclusive order. When he does so, with the acquiescence of both parties, there is just as much a step in the proceedings by each of the parties as if an order had been made on his separate application. The defendant might have objected to the making of the order on the ground of the agreement to refer differences, but he did not do so, and is not in a position to ask for a stay under s.4 of the Arbitration Act."

The position here in my view is similar. Whatever action might have been taken by the defendants before the hearing of the Summons for Directions, the fact remains that learned counsel for the defendants appeared at the hearing thereof and without objection allowed the hearing to proceed and conclude and the court made the various orders on this Summons included in which is an order for discovery which, in my view, would come within what was stated by Collins M.R. in the *County Theatres and Hotels* case that in this respect, there was just such a step in the proceedings by each of the parties as if an order had been made on his application with regard to discovery. I am therefore of the view that the situation here is covered by the case to which reference has been made. This principle is also referred to in *Russell* on Arbitration at page 173 where it is there stated that a defendant attending the hearing of a summons for directions on which an order was made or an undertaking given by the defendant has been held to be the taking of steps in the proceedings. It is not disputed that at the hearing of the Summons for Directions there was no indication by the defendants of any objection to the hearing thereof with the result that the Summons for Directions was heard and the various orders made by the court thereon.

In my view, in this connection, the pleading in

A para. 1 of the Defence and Counterclaim is no ground to justify the taking of the view that this constitutes a qualification to the unqualified appearance and taking part in the hearing of the Summons for Directions by the defendants.

B For the reasons given, therefore, I am of the view and hold that because the defendants had already taken a step in the proceedings within the meaning of section 6 of the 1952 Act before making the instant application, it must necessarily fail. Accordingly, the application is dismissed with costs.

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Application dismissed.

Solicitors: *Loa & Co.; Sulong Matjeraie & Co.*

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SENG HUAT HANG SDN. BHD. v. CHEE SENG & CO. SDN. BHD.

[A.C.J. (Edgar Joseph Jr. J.) June 1, 1985]

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[Penang — Civil Appeal No. 60 of 1982]

Practice and Procedure — Default judgment — Application to set aside — Subordinate Court Rules 1980, O.28, r.8(1).

F The appellant had applied unsuccessfully to set aside a default judgment giving possession of certain premises in Penang occupied by it to the respondent, both parties being incorporated companies. The record showed that on the date fixed for hearing, although the suit had been thrice stood down to enable the appellant and/or its counsel to appear, neither did so. In the event, the respondent's counsel asked for judgment in default to be entered in favour of his client and on September 15, 1982, an order was made accordingly. A few days later the appellant applied to set aside the default judgment and upon refusal by the learned President, the appellant appealed.

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Held, dismissing the appeal: (1) under the current Subordinate Courts Rules, whilst an explanation for absence was clearly relevant for the Court to consider in deciding whether or not to set aside a default judgment, it need not be a decisive consideration;

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(2) what is crucial in applications of this sort is whether there was *evidence* before the Court disclosing a *prima facie* defence to the plaintiff's claim for possession or, in other words, a defence on the merits. For this purpose, the applicant need only disclose an arguable or triable issue;

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(3) in this case neither counsel's affidavit nor the statement of defence was *evidence* showing a *prima facie* defence within the meaning of *Evans v. Bartlam*.⁽¹⁾

Cases referred to:

(1) *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd.* [1982] 2 M.L.J. 79.

- (2) *Packirisamy v. Janagi* [1970] 2 M.L.J. 202.
- (3) *Safety Insurance Co. Ltd. v. Hua Seng Electric Co.* [1968] 1 M.L.J. 273.
- (4) *Gan Kim Kiat Bros. Realty Sdn. Bhd. v. Leang Ah Kan* [1983] 1 M.L.J. 351.
- (5) *Drayton Giftware Ltd. v. Varyland Ltd.* (1982) 132 N.L.J. 558.
- (6) *Farden v. Richter* (1889) 23 Q.B.D. 124, 129.
- (7) *Evans v. Bartlam* [1937] A.C. 473.
- (8) *Million Group Credits Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1986] 1 M.L.J. 315.

CIVIL APPEAL.

Wong Hoong Yin for the appellant.
SP. Annamalai for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: At the conclusion of the arguments yesterday, I dismissed this appeal and would now state my reasons for having done so.

The appellant (the defendant in the court below) had applied unsuccessfully to set aside a default judgment, giving possession of certain premises known as Godown No. 121, Weld Quay Foreshore, Penang ("the premises") occupied by it, to the respondent (the plaintiff in the court below), both parties being incorporated companies.

The record provided shows that on the date fixed for hearing, although the suit had been thrice stood down, to enable the appellant and/or its counsel to appear, neither did so. In the event, the respondent's counsel asked for judgment in default to be entered in favour of his client and an order was made accordingly. In doing so, the learned President was clearly acting within the ambit of her powers since both the appellant and its counsel were absent (see *Shaharudin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd.*⁽¹⁾). This was on September 15, 1982.

Six days later, the appellant applied to set aside the default judgement under the provisions of O.28 r.8(1) of the Subordinate Courts Rules, 1980, which reads:

"Any judgement or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just".

However, at the conclusion of the arguments, and after having reserved her decision, the learned President dismissed the application with costs.

A It is from this decision that the appeal before me now lies.

In her grounds of decision, the learned President had dealt with the explanation for absence offered by counsel of the appellant with great care and concluded as follows:

B "In the instant case, it was not apparent from a reading of Mr. Wong's affidavit why he was absent. He stated that he was indisposed and did not elaborate further. It was only on enquiry by the Court that he stated that he did not attend Court because he had friends from Thailand visiting him. With respect, that is not a reason acceptable to the Court, and it would be setting a dangerous precedent to accept it. There must be a good many people who would prefer to be elsewhere when duty requires them to be in Court. In any case no application for postponement was made even though counsel was present for a few moments. Had it been inconvenient for Mr. Wong to appear in the afternoon, he should have appeared punctually in the morning and asked for his case to be heard first. The Court would have been more willing to accommodate him."

C The defendants had been given every opportunity of being heard, to the extent that the Court stood down the case no less than three times to enable them to appear. This was not a case where either counsel or the defendants had been absent due to some mistakes or oversight. They were not heard because they chose not to be heard on the day appointed for hearing and they did so at their own peril, since approval was neither sought nor given by the Court."

D I have no quarrel with the learned President, both as regards her reasoning and her conclusion regarding this part of the case.

E In deciding the application before her, the learned President took into consideration, on the one hand, the well settled principle referred to by Sharma J. in *Packirisamy v. Janagi*⁽²⁾:

"That every opportunity should be given to litigants to put forward their case"

and on the other, that referred to by Ali J. (as he then was) in *Safety Insurance Co. Ltd. v. Hua Seng Electric Co.*⁽³⁾:

"That it should not be taken for granted that because a party has a good defence to an action, he can deliberately ignore the rule governing appearance."

I In referring with approval to what Ali J. said, the learned President recognised that his Lordship was deciding a case governed by O.19, r.3(1) of the old Subordinate Courts Rules, 1950, which required "good reason for absence to be shown" before a default judgement could be set aside, whereas no equivalent words appear in the Subor-

dinate Courts Rules, 1980. This view appears to find support in a *dictum* of Peh Swee Chin J. in *Gan Kim Kiat Bros. Realty Sdn. Bhd. v. Leang Ah Kan*⁽⁴⁾, 352 Col. 2C which reads:

"In practice any request or application to set aside a default judgment should normally be readily granted by the Court unless the plaintiff's absence was either intentional or contumacious."

In my opinion, under the current Subordinate Courts Rules, whilst an explanation for absence is clearly relevant for the Court to consider in deciding whether or not to set aside a default judgment, it need not be a decisive consideration.

What I consider however to be crucial in applications of this sort is whether there was *evidence* before the Court disclosing a *prima facie* defence to the plaintiff's claim for possession or, in other words, a defence on the merits. For this purpose, the applicant need only disclose an arguable or triable issue: *Drayton Giftware Ltd. v. Varyland Ltd.*⁽⁵⁾ or, in other words, an arguable case which ought to go for trial.

I am aware that some of the older cases like *Farden v. Richter*,⁽⁶⁾ say that where it is sought to set aside a regular judgment, then it is (*almost*) an inflexible rule that there must be an affidavit stating facts showing a defence on the merits.

But I much prefer the later House of Lords case of *Evans v. Bartlam*⁽⁷⁾ which I believe to be the *locus classicus* on the point. Lord Atkin speaking for the House in that case enunciated the principles applicable thus:

"The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

A Accordingly, with Lord Atkin's principles in mind, I scrutinised the record to see if there was *evidence* in the Court below disclosing a *prima facie* defence to the plaintiff's claim for possession.

B In the instant case, a defence had been filed which averred that "the defendant is the tenant of the premises at the monthly rental of \$324 for as long as the plaintiffs are able to acquire a Temporary Occupation Licence and or the right to remain at the said godown from the State Government of Penang."

C In answer to the court, during the argument, counsel for the appellant explained that in support of this defence, the appellant would rely on an oral tenancy agreement allegedly entered into after expiry of a "Tenancy Lease Agreement" in writing dated December 1, 1973 for one year (p. 49/52).

D Clearly, whether or not there was such oral tenancy agreement was an issue of critical substance, yet there was no affidavit affirmed to by any duly authorised representative of the appellant company averring the alleged oral tenancy agreement. Instead, the only affidavit filed in support of the application to set aside the default judgment was that by counsel for the appellant which contained precious little as regards the defence to the claim. All it said was this: "I verily believe that there are merits in my client's defence and, amongst other things, the said Notice to Quit is bad in law and unenforceable."

E Presumably, the reason for this conclusion of law was the existence of the alleged oral tenancy agreement as to which counsel could not possibly have any personal knowledge.

F With respect, in matters where disputed questions of facts are involved, it is for the parties and not their solicitors to affirm affidavits relating thereto: see *Million Group Credits Sdn. Bhd. v. Lee Shoo Khoo & Ors.*⁽⁴⁾

G In my opinion, therefore, neither counsel's affidavit nor the statement of defence was *evidence* showing a *prima facie* defence within the meaning of *Evans v. Bartlam* (*supra*). A trite point, perhaps, but a crucial factor which was overlooked all round both here and in the Court below.

H On this ground alone (though the learned President did not rely on it) I was prepared to and

did dismiss the appeal with costs. I also ordered payment out to the respondent of the sum paid into Court by way of security for costs of the appeal to account of its costs.

In consequence, I made the same orders in seven other related appeals being, numbered 59, 61 to 66 of 1982, raising identical questions of fact and law.

Appeal dismissed.

Solicitors: Wong Hoong Yin & Co.; Annamalai & Co.

MAHAT BIN ABDUL MAJID & ANOR. v. LAU KUI & ANOR.

[O.C.J. (Shankar J.) June 18, 1985]
[Johore Bahru – Civil Suit No. 256 of 1982]

Tort – Negligence – Collision between motor-cycle and motor-lorry – Motor-cyclist and pillion rider injured – Question of liability.

Damages – Fracture of radius, ulna and right femur – General damages at \$34,000.

Damages – Fracture of acetabulum and ramus of pubic bone – General damages at \$40,000.

The 1st plaintiff, Mahat, rider of a motor-cycle, met with an accident at 23½ milestone, Air Hitam/Johore Bahru road, on August 12, 1981. The 2nd plaintiff (Zaleha) was his pillion rider and wife-to-be. He left Muar for Johore Bahru for his wedding which was to take place that evening. A collision took place between the motor-cycle and the motor-lorry driven by the 1st defendant (lorry driver) at about 2.25 pm when the weather was good and the road dry. Coming from Air Hitam and proceeding in the direction in which Mahat was travelling, the 1st defendant had to negotiate a very sharp left-hand bend just before the place where the impact occurred. Coming from Johore Bahru and going in the direction in which the lorry driver was travelling, Mahat had to negotiate a left-hand bend after which the road was straight for some 3½ to 4 chains to the place where the impact occurred. The damage to the lorry was concentrated entirely on its off-side rear wheel. The entire damage to the motor-cycle was concentrated on its front in the vicinity of the wheel which had come adrift. Mahat said after he had negotiated the bend he saw the lorry encroach onto his path. Zaleha's evidence on liability is substantially similar to Mahat's. The lorry driver said he had taken a slight left-hand bend and was approaching the scene of accident when he saw the motor-cycle negotiating the bend ahead. After the motor-cycle went past, the lorry driver heard a bang from the rear.

Mahat sustained fracture of the mid-shaft of the right radius and ulna and the right femur. Compression

plating of the right radius and ulna was done on August 24, 1981 and intramedullary nailing of the right femur was done on September 2, 1981. Thereafter his right knee was stiff and his right elbow was limited in supination. He had scars on his forearm and thigh and on the right gluteal region. There was some limitation of movements in the right hip. He had an abnormal extension of 10 degrees in the right knee and a limitation flexion also which would prevent him from squatting and sitting cross-legged. He was a piling operator and his injuries were such that he would not be able to return to his job as a piling machine operator.

Zaleha sustained a fracture of the left acetabulum and superior ramus of the right pubic bone and abrasions and lacerations. As a result of her injuries, she cannot move her hips, knees and feet with normal facility, walking is barely possible and is at a slow rate. She walks with a limp and is liable to lose balance easily. In her case also, the only dispute was her claim for earning capacity because she could not function comfortably in her occupation as a telephone operator.

Held, dismissing the action with costs: (1) the accident was caused entirely by the negligence of Mahat;

(2) in the event that the defendant were liable, damages would be assessed as follows:

- E** *In respect of Mahat*
- (a) special damages agreed at \$4,500;
 - (b) general damages agreed at \$34,000;
 - (c) \$700 p.m. for the period of total incapability;
 - (d) future loss assessed at 17 years and 2 months at \$100 p.m. on the actuarial tables.
- F**

- In respect of Zaleha*
- (a) special damages agreed at \$600;
 - (b) general damages for pain and suffering agreed at \$40,000;
 - (c) claim for loss of earning capacity failed for lack of evidence.
- G**

H *Obiter dictum:* "The time may soon come for us to consider whether in the light of modern circumstances the cause of action vested in a married woman to sue for damages which her husband has caused her does not constitute a part of her separate property."

Cases referred to:

- I**
- (1) *Tara Singh v. The Public Prosecutor* [1954] M.L.J. 123.
 - (2) *K.R. Taxi Service Ltd. & Anor. v. Zaharah & Ors.* [1969] 1 M.L.J. 49.
 - (3) *Brophy v. Shaw* *London Times* dated June 25, 1965.
 - (4) *Curtis v. Wilcox* [1948] 2 K.B. 474, 479.
 - (5) *Drinkwater & Anor. v. Kimber* [1952] 1 All E.R. 701.